SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-202

THE KROGER CO.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As will appear, the reasons for granting a writ of certiorari are fortified by the Brief in Opposition (hereafter "Opp."). In essence it simply parrots the unwarranted impeachment of Casserly below (Petition 7-9, 23-25).[1] There is no denial that this is a case of first impression. Respondent's position invites the anticompetitive exchange of price information among sellers. Respondent does not mention its own issuance of a complaint—seven weeks before its brief was filed—by which it acknowledged that Section 5 of the Federal Trade Commission Act is the proper basis for testing a buyer's bargaining conduct. In arguing that Petitioner received adequate notice of the issues resolved below, Respondent's sole precedent is a case decided on a stipulated record, three years before the Administrative Procedure Act was passed.

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[1] Hereafter "Pet."

I. *Respondent Improperly Solicits The Court To Rewrite Subsection 2(f).*

Beyond the lack of precedent,[2] neither Respondent's analysis, nor any policy consideration, supports the attempt to downgrade the square holding of *Automatic Canteen* against 2(f) liability when the price is "within one of the seller's defenses" (346 U.S. at 74). Admitting that this principle is "accurate as a general proposition," Respondent would escape it as a mere casual reference "needed to decide the narrow issue in that case 'involving simply the burden of coming forward with evidence under § 2(f) of the Act' " (Opp. 14). However, Mr. Justice Frankfurter's opinion is clear that this Court's determination that buyer liability is purely derivative followed an exhaustive study of § 2(f)'s "substantive prohibition" (346 U.S. at 74).

It makes no difference that 2(f) might be desirably strengthened—which, like Commissioner Elman (D: 98), we question[3]—by rewriting it to cover "a discrimination in price which is [NOT] prohibited by this section." As this Court held in *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 479 (1952):

> "Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions, but that is a question of policy for Congress."

The Court "cannot supply what Congress has studiously omitted." *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959).

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[2] Respondent cites no precedent sustaining the decision below because there is none. All other authorities unanimously followed the derivative 2(f) rule of *Automatic Canteen* (Pet. 18-20).

[3] See pp. 4-7, *infra*.

Nor does Respondent overcome the "prohibited" discrimination requirement of 2(f) by arguing that Beatrice's price, although lawful for it, was "prohibited" to Kroger, due to alleged overstatement of the Broughton discount offer (Opp. 13-14). The fallacy of this claim is apparent from Respondent's calculated deletion of the language in brackets in quoting the following passage from *Automatic Canteen* (346 U.S. at 74; Opp. 14):

> "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses [SUCH AS THE COST JUSTIFICATION] or not known by him not to be within one of those defenses."

Respondent itself admits that in seeking a lower price, Casserly was prompted by cost-saving considerations authorized by the Act, rather than a purpose to induce an illegal price discrimination.[4] According to Respondent, his basic motivations were "the larger volume of milk Kroger would require for the Charleston Division" and the fact that "only a 'stripped service' was being requested" (Opp. 7).[5] It is also acknowledged that Kroger was negotiating for "products under private label" (Opp. 4). "There are readily recognizable actual cost differences between [dairy] brand and private label which will justify differences in price." *The Borden Co.*, 62 F.T.C. 130, 181 (1963).[6]

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[4] It is undenied that at the virtual start of negotiations, on January 25, 1962, Casserly informed Beatrice that its competition was Fairmont, not Broughton (Pet. 11-12 and n. 19). See Appendix below, Volume II, at 204 (lodged with the Clerk of the Court).

[5] It is undenied that Kroger's individual store requirements far exceeded those of any other Beatrice customer (Pet. 6 and n. 7).

[6] The emptiness of the effort to use Casserly's comments about Broughton as a means of converting Beatrice's price into a "known" prohibited discrimination is further evidenced by the undenied

[*footnote continued on next page*]

2. *The Decision Below Conflicts With The Policy Of The Antitrust Laws And With Automatic Canteen's Admonition Against Emasculating A Buyer's Right To Bargain.*

Accepting *arguendo* the Government's allegations about Kroger's negotiating conduct—which we deny[7]—the national policy of preserving a competitive economy is incompatible with the presently attempted construction of 2(f). The touchstone is *Automatic Canteen's* warning against interpretation of the Robinson-Patman Act to "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at 63) and its consequent emphasis on the necessity of a construction allowing "sturdy bargaining between buyer and seller" (*id.* at 74).

Respondent's present position flatly conflicts with those principles, notwithstanding its professed concern for reconciling the price discrimination law and the Sherman

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facts concerning (a) the virtual elimination of the differential between Kroger's private label and Beatrice's brand prices, upon the introduction of cost-plus, limited service terms to the trade at large (Pet. 14); (b) the unparalleled assurances furnished by the dairies to Kroger that their stripped-service, cost-plus prices were lawful (Pet. 11); (c) the admission that Broughton's discount quotations allegedly "averaged 77 cents per gallon jug" (Opp. 6), compared to "cost-plus formula . . . prices ranging from 66 cents to 69 cents" (Opp. 8 n. 6); and (d) the finding that Fairmont adhered to its original discount proposal, but that its cost-plus quotations were "substantially lower than prices under the discount schedule" (FT:28).

[7] Respondent's Brief nowhere disputes our refutation of the claim that Casserly misrepresented Broughton's offer (Pet. 7-9), including, *inter alia*, the silence of the Initial Decision concerning any challenge to his credibility (Pet. 25). The tactic is to treat the incrimination of Casserly as established fact, on the hypothesis that the Court will not bother to consider Respondent's improper basis for the accusation (Pet. 8-9) or the injection of the question in violation of the Administrative Procedure Act and the Commission's Rules (Pet. 23-26). See pp. 10-12, *infra*.

Act. In this connection, it attacks the recent decision in *Wall Products Co.* v. *National Gypsum Co.*[8] The contention is that the court there improperly invoked 2(b) of the Robinson-Patman Act as a basis for allowing sellers to compare price information, in defiance of this Court's ruling in *United States* v. *Container Corp.*, 393 U.S. 333 (1969), against "agreements to exchange actual price bid information" (Opp. 15 n. 13). According to Respondent, "the instant case reflects a far better accommodation between the Sherman and Robinson-Patman Acts" (*ibid.*). This analysis is shallow.

First, under Respondent's view, only the form, not the result, will differ from *Wall Products, supra.* Respondent expressly invites sellers to obtain "customer information regarding competitive bids" (Opp. 15 n. 13). Consequently, instead of consulting among themselves, sellers will shift to buyers as conduits for the exchange of price information. Since "customer information" will have to be "correct information" (Opp. 10), subsection 2(f) will simply be substituted for 2(b) as a shield for the practice. Moreover, since the prices will concern bids for *current* business, the anti-competitive potential will be more severe than in *Container, supra,* which involved *past* prices "concerning specific sales to identified customers" (393 U.S. at 334).

Second, under Respondent's "correct information" standard (Opp. 10), the buyer's bargaining capability will be undermined. A buyer cannot bargain, but will be left at the mercy of his "commercial antagonists, sellers," if required "to lay all his cards face up on the table." *Forster Manufacturing Co.* v. *FTC,* 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied,* 380 U.S. 906 (1965). In consequence, the initially offered price will typically become

[8] 326 F. Supp. 295, 312-13 (N.D. Cal. 1971).

the floor price. For one thing, 2(b) in terms specifies that a seller may "meet an *equally* low price of a competitor."[9] Once notified that he is undercutting a competitor's price, he will lose the 2(b) defense unless he retracts his offer.[10] For another thing, the cost justification defense will hardly encourage sellers to underbid. Reliance on that defense is notoriously hazardous. In *Automatic Canteen*, the Court spoke of "the considerable burden a seller . . . may have in demonstrating costs" (346 U.S. at 69), and further noted:

> "Proof of a cost-justification being what it is, too often no one can ascertain whether a price is cost-justified" (*id.* at 79).

The prescience of these comments was subsequently demonstrated by the cost-justification burdens imposed in *United States* v. *Borden Co.*, 370 U.S. 460 (1962).

It follows that Respondent urges the precise result against which this Court warned in *Automatic Canteen*—*i.e.*, "putting the buyer at his peril whenever he engages in price bargaining." 346 U.S. at 73. The vice is compounded and the necessity for review accentuated by a proposed complaint—next considered—which Respondent released on June 2, 1971, but unaccountably ignores in its present Brief, filed seven weeks later, on July 26, 1971. *The Great Atlantic & Pacific Tea Company, Inc. and Borden, Inc.*, 3 CCH

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[9] Emphasis supplied here and throughout.

[10] The seller's reasonable belief that he is meeting a competitor's price is the basis of the authorities sanctioning the 2(b) defense when the competitive price is undercut. He must then "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945). There can be no such belief, supporting a lower price, when the actual competitive price is disclosed.

TRADE REG. REP. ¶ 19,639 (hereafter "*A&P-Borden*").[11] Respondent's press release and complaint in that matter are attached as Appendices A and B.

3. *Respondent Has Recently Acknowledged That Section 5 Of The Federal Trade Commission Act Is The Appropriate Basis For Evaluating A Buyer's Bargaining Conduct.*

The *A&P-Borden* complaint confirms our views (a) that the validation of the seller's 2(b) defense forecloses 2(f) liability (Pet. 17-20); and (b) that there is no *ad hoc* justification for the decision below, since Section 5 of the Federal Trade Commission Act provides the appropriate mechanism for testing the propriety of a buyer's bargaining conduct (Pet. 22-23). The subject matter of *A&P-Borden* is likewise a dairy's provision to a grocery retailer of lower prices for private label milk in one area—there Chicago, Illinois—pursuant to competitive bidding.

In brief, the complaint omits any 2(a) charge whatever against the seller, Borden. It states both a Section 5 count and a separate 2(f) count against the buyer, A&P. Each of those counts alleges illegal inducement of a discriminatory price because of A&P's failure to notify Borden that it had undercut a competitor's price.[12] The complaint is

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[11] Rule 2.31 of the Commission's Rules of Practice provides for the issuance of "a form of complaint which the Commission intends to issue, together with a proposed form of order" (16 CFR § 2.31), as a prelude to possible settlement "by the entry of a consent order." Rules 2.32-2.34, 16 CFR §§ 2.32-2.34.

[12] The Section 5 count against A&P alleges (*A&P-Borden*, Appendix B, *infra*, PARAGRAPH NINE, p. 4):

> "At the time Borden tendered its final offer to A & P, the offer which was accepted to form the said agreement, Borden informed respondent A & P that the offer was being granted for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession.

[*footnote continued on next page*]

accordingly structured to set up a decision against the buyer, even if 2(b) prevents a ruling that the seller's price is prohibited. *A&P-Borden* thus negates any necessity for distorting 2(f) by an interpretation holding the buyer guilty of receiving a "prohibited" price discrimination, notwithstanding an adjudication that the seller lawfully granted the price.

In contrast to this case, the Section 5 count in *A&P-Borden* provides the common sense method for testing the buyer's bargaining conduct. Instead of nullifying the buyer's bargaining capability—by a rule-of-thumb construction of "the Robinson-Patman Act to convert it into a 'truth-in-bargaining' statute" (Commissioner Elman, dissenting, D: 97)—the flexibility of Section 5 leaves room for reviewing his conduct in the total context of all relevant factors.

As stated by the House Managers of the Conference Committee, which reported the bill enacted as the Federal Trade Commission Act (H. Rep. No. 1142, 63rd Cong., 2nd Sess. at 19):

> "Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances." [13]

A & P accepted the said offer of Borden *with knowledge that Borden had granted a substantially lower price* than that offered by the only other competitive bidder and *without notifying Borden of this fact.*"

The 2(f) count incorporates the above language by reference (*id.* COUNT TWO, pp. 4-5). There is also a Section 5 count alleging an illegal price combination between A&P and Borden, (*id.* COUNT THREE, pp. 5-6).

[13] This Court has similarly recognized the flexibility of Section 5. See, *e.g., Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 367 (1965); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 532-33 (1935); *FTC* v. *Keppel and Brother, Inc.*, 291 U.S. 304, 310-12 (1934).

This points to the realism of the Section 5 approach. No complete catalog can be stated of all factors which might be relevant in determining the propriety of a buyer's bargaining negotiations. But some can be suggested. Among them are differences, if any, in the terms of sale and delivery sought by the buyer, compared with the seller's other customers; whether the buyer is seeking brand or private label product;[14] the pressures, if any, exerted by the buyer;[15] the representations made by the sellers to the buyer concerning the bases of their offers;[16] the reasonableness or exorbitance of the brand prices regularly quoted by the sellers; and the competitive structure of the market, including the uniformity or disparity of the prices quoted by ostensible competitors.

The *A&P-Borden* complaint points up the need for prompt review of the decision below. Respondent was not content with the Section 5 unfair competition count in that complaint, but included a 2(f) count. This indicates that the denial of certiorari here will invite abandonment of the use of Section 5 in favor of the application of 2(f) on a virtual *per se* basis—without considering the total circumstances—whenever the buyer fails to provide sellers with correct "information regarding competitive bids" (Opp. 15 n. 13).

Indeed, under the theory of the *A&P-Borden* complaint, the buyer could not even stand mute. The alleged vice there

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[14] Unlike Kroger, other retailers admittedly bought "under brand names of the dairies" and "received the 'full service' method of milk distribution" (Opp. 5).

[15] The Commission's majority opinion dispels coercion by Kroger as a basis for its decision (FT: 80-81).

[16] There is no parallel in any case to date for the definitive assurances to Kroger that the dairies' offers were cost-justified because of the substantial differences between the regular service to other customers and the stripped service method of delivery to Kroger (Pet. 11; Opp. 5, 7).

was A&P's receipt of a lower price "without notifying Borden of this fact" (p. 7 n. 12, *supra*).

The Court is familiar with the all too frequent protraction of proceedings before the respondent agency. *FTC* v. *Standard Oil Company*, 355 U.S. 396, 398 (1958); *Texaco, Inc.* v. *FTC*, 336 F.2d 754, 763 (D.C. Cir. 1964), *vacated and remanded*, 381 U.S. 739 (1955). It should grasp the present opportunity to protect buyers against Respondent's tightening squeeze on their bargaining rights.

4. *Respondent Does Not Dispel The Complete Failure To Accord Kroger Its Rights Under The Administrative Procedure Act And The Commission's Rules Of Practice.*

First, assuming *arguendo* that Commission counsel attacked Casserly's veracity before the Initial Decision, the challenge came too late. Respondent relies solely on a "reply memorandum filed with the hearing examiner two months prior to his initial decision" (Opp. 16-17). This was filed on July 21, 1967, exactly four months after the last hearing day and simultaneously with Kroger's reply.[17] Even if the issue had been raised before the hearing Examiner—which we deny—it was out of time (Pet. 23-25). This is confirmed by Respondent's inability to cite a single precedent supporting its position.

Second, the underlying recitals in Respondent's Brief rebut the claim that Casserly's veracity was put in issue before the Examiner. These recitals are (Opp. 17):

> "with respect to the alleged 20 percent Broughton discount, '[i]n actuality, an examination of this Broughton proposal shows that it did not offer a *uniform 20% discount* and that the prices offered Kroger in this proposal were *substantially higher* than those granted by Beatrice'."

[17] Appendix below, Volume I, pp. ix-x (lodged with the Clerk of the Court).

But the compelling facts are that Casserly had never testified that Broughton offered "a uniform 20% discount,"[18] and no one doubted that Broughton's discount prices "were substantially higher than those granted by Beatrice." The issue was whether *Fairmont's* prices were higher (FT:36-41). Particularly in light of Commission counsel's express support of Casserly in their proposed findings (Pet. 8), the quoted passage from their reply memorandum provided no notice that Casserly's testimony about the Broughton offer was disputed—as the Examiner's silence on the issue attests. The issue was first belatedly raised before the Commission (CA:11), but Respondent implicitly confesses that this was out of time, making no reference to it whatever.[19]

There is no more merit in the attempted defense of the complaint's neglect to put Kroger on notice either of the legal issue of potential independent 2(f) liability or of the factual issue concerning alleged misrepresentation of the Broughton offer. The sole citation in support of the complaint's sufficiency is a case decided on May 10, 1943 (Opp. 17).[20] That decision was issued three years before

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[18] Casserly meticulously avoided any description of the offer as "a uniform 20% discount". For example, on cross-examination by Beatrice's counsel, he testified (Appendix below, Volume II, at 299 (lodged with the Clerk of the Court)):

> "Q. Mr. Casserly, the first formal bid you received was from Broughton, isn't that correct? A. Correct.
>
> "Q. And the 20 per cent discount they offered you, do you recall whether— A. That was an average 20 per cent, Mr. Foote. It was a little above on some, a little below on others."

[19] Although it is not denied that "the Commission impeached Casserly" (Pet. 9), there is no defense of the failure to follow the Commission's impeachment rule (Pet. 26 n. 44).

[20] *A. E. Staley Mfg. Co.* v. *FTC*, 135 F.2d 453, 454 (7th Cir. 1943). The court there emphasized that the parties "stipulate[d] all of the facts in this case" and emphasized that it was sustaining the administrative decision "under the circumstances of this case" (*id.* at 454-55).

the enactment of the Administrative Procedure Act on June 11, 1946. 5 U.S.C. (1970 Ed.), notes preceding § 551; 60 Stat. 237.[21] The notice deficiency of the present complaint is implicitly conceded by the contrasting particularity of the *A&P-Borden* complaint (p. 7 n. 12, *supra*).

CONCLUSION

For the reasons set forth in the petition and in this brief, a writ of certiorari should be granted.

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[21] We are baffled by the claim that Kroger knew that independent 2(f) liability was in issue, because of its objections to the admission against it of communications between Beatrice and Respondent and of internal Beatrice documents (Opp. 18). As the Examiner properly ruled, these were sheer hearsay as to Kroger (ID 155; Pet. 15 n. 25).